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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JAMES J. LAUGHLIN,
National Press Bldg.,
Washington, D. C.,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Orman W. Ewing respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove therefrom, for review here, the record in the case No. 8308, wherein petitioner is appellant and the United States of America is appellee, and in which case that court announced its opinion

under date of December 1, 1942 (R. 110) affirming the judgment of the District Court of the United States for the District of Columbia.

Summary Statement of Matter Involved.

Petitioner was indicted on November 4, 1941 for the crime of rape. The offense was alleged to have been committed on October 26, 1941 and petitioner was arrested on the night of October 27th. He was denied bond and has been confined in jail since his arrest. After a trial before the Honorable James W. Morris and a jury in the United States District Court for the District of Columbia, petitioner was convicted. The judgment and sentence of the Court was confinement in the penitentiary for a period of 8 to 24 years (R. 22). The court below affirmed the judgment and sentence (R. 124). Petitioner has at all times denied the charge and has consistently maintained his innocence.

During the course of the trial, a defense witness was asked questions on cross-examination about a visit made by this witness to the home of the mother of the *complaining witness* in Utah. The interrogation developed that the witness was a friend of the mother of the complaining witness and the government sought to establish that the purpose of the visit was to discuss the subject matter of the pending trial. On direct examination, there was no evidence developed with respect to this visit. However, on cross-examination, the government asked:

> Q. Now in that conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say Yes?
>
> A. No, she didn't. (R. 32.)

Notwithstanding the aforesaid denial, the government called, as the last witness in the case, in rebuttal, the mother

of the complaining witness and, after redeveloping the *visit* to Utah, the following colloquy occurred:

> Q. On that occasion, did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter," and did she say, "I do believe it?"
>
> A. Yes, she did.
>
> Q. Did she further say on that occasion, "He is facing the electric chair, and I have got to be on his side?"
>
> A. Yes. (R. 32, 33.)

It is with respect to this line of testimony, and the propriety thereof, that the basic question of law underlying this petition is raised. Error was assigned and the court below considered the question. The majority concluded that the admissibility in evidence of the opinion of the witness as to the guilt or innocence of the accused was proper. The Chief Justice disagreed.

Further, the prosecutor, without any basis in the indictment or in the evidence, cast grave moral aspersions by seeking through inference to blacken the character of petitioner. On the *voir dire,* the government by innuendo sought to connect petitioner with a person indicted for sending obscene literature through the mails (R. 39). At the trial this program was continued by asking a defense witness if he and petitioner had not discussed having a party with "some whiskey * * * and some of the girls" on the night of the alleged crime. The witness denied such a conversation (R. 115). The court below considered this to be of "doubtful propriety" but passed over it as being non-prejudicial (R. 115).

Statement of the Case.

Complaining witness Betty Ruth Crandall, was 19 years of age and reached her 20th birthday two weeks after

the alleged occurrence, Oct. 26, 1941. She testified that she came to Washington from Provo, Utah, on Oct. 12, 1941 to take a position with the government. Upon arrival in Washington she went to live temporarily at the Whitestone Inn, a rooming house at 1101 16th St. N. W. as the guest of Miss Hester Chamberlin who had been acquainted with her mother in Provo, Utah, and Miss Crandall occupied the bedroom of Miss Chamberlin's office apartment and Miss Chamberlin slept on a cot in the office or other room of the apartment. The testimony showed that Miss Chamberlin and petitioner jointly owned the Whitestone Inn, which Miss Chamberlin managed and at the time petitioner was constructing an addition to the building and also using Miss Chamberlin's office apartment as a construction office.

Miss Crandall, the prosecutrix, testified that on Oct. 25th she went out with a friend,—Robert A. Payne, a roomer at the Whitestone; that they returned to the Whitestone at about 12:30 and at about 1:15 she went to Miss Chamberlin's apartment and there saw the petitioner and Miss Chamberlin having a drink and petitioner offered her a drink, which she refused. She testified she remained there for about five minutes and then went to the bedroom and retired in her panties and a housecoat and after she had been in bed for twenty or thirty minutes the petitioner came into the room and against her will forced her to submit to sexual intercourse. She stated that petitioner threatened to kill her and threatened to "throw her in the hole." She was referring to the excavation for the annex to the building. She admitted that the windows of the apartment were ground level and were permanently barred (Orig. R. 759). She stated that she did not scream (Orig. R. 838) although there were many people in the house (Orig. R. 813); that her clothing was not torn (Orig. R. 835) nor did she have any marks or bruises on her body (Orig. R. 838) and that she went to sleep following the alleged occurrence

and slept until 8:30 a. m. (Orig. R. 819). The testimony also showed that no complaint was made until twenty-four hours later and then such complaint was made by Mr. Payne after getting the prosecutrix out of bed on the night following the alleged occurrence (Orig. R. 988).

The petitioner testified on his own behalf that he worked on his books and records in the office or pine room of the apartment (the room adjoining the bedroom where the complaining witness slept) until after 1:00 a. m. of the morning in question. He testified that he called his home after one o'clock and told his wife that the construction crew were going to work Sunday, Oct. 26, and he would have to be there early to get the men started and would remain at the Whitestone overnight. He testified he had been working on his records in Miss Chamberlin's Apartment and that she and the petitioner drank a highball and were drinking a second when the complaining witness entered after 1:30 a. m. and joined with them in having a highball. He testified he left the apartment just before 2 o'clock to stop a plumbing leak on the third floor and retired about 3 a. m. in a vacant room across a hall from the pine room where Miss Chamberlin was sleeping. Petitioner consistently denied any intercourse with the complaining witness.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under (A) Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and (B) the Act of March 8, 1943, and the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, pursuant thereto.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on December 1, 1942 (R. 124), affirming the judgment of the United States District Court for the District of Columbia.

Petition for rehearing was filed on December 8, 1942 (R. 124-132); opposed December 9, 1942 (R. 132); and denied December 11, 1942 (R. 133).

While the errors herein complained of were assigned on appeal, there was no objection made or exception taken thereto at the trial. This, however, was cured by the trial court (Mr. Justice Morris) who, under the power granted in 28 U. S. C. A. 391, deemed it proper to consider them (R. 31, 32).

Questions Presented.

Is it not prejudicial error, destructive to a defendant in a criminal trial in a Federal court, for the trial court to permit a witness for the Government to testify that, in a conversation with one of the defendant's witnesses, the latter had expressed the opinion that the defendant was guilty of the crime for which he was on trial? Collaterally, is not such prejudice so serious as to deprive the defendant of *any trial at all* when the Government witness so testifying is the mother of the complaining witness in a rape case?

In a trial for the crime of rape, is it not substantial prejudicial error for the Government to cast, through questions put to the panel and to witnesses, aspersions on the character of the accused, when there is no basis therefor under the evidence?

Reasons Relied Upon for Allowance of Writ of Certiorari.

1. The United States Court of Appeals for the District of Columbia has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court of the United States for the District as to call for this Court's power of supervision.

2. The court of appeals has decided an important question contrary to local law. *Yeager* v. *U. S.*, 16 App. D. C. 35

(1900) had always been the law of the District of Columbia until the decisions below.

3. The court of appeals has sanctioned a rule of evidence that invades the province of the jury.

4. The opinion of the court of appeals misconstrues the law as to prejudicial evidence improperly injected in a criminal case by the prosecution.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8308, Orman W. Ewing, appellant versus United States of America, appellee, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

JAMES J. LAUGHLIN,
Attorneys for Petitioner.